INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Application of Kelly, 19 F.R.D. 269	8
April 1956 Term Grand Jury, In re, 239 F. 2d 263	8
Cobbledick v. *United States*, 309 U.S. 323	5
Okla. Press Pub. Co. v. *Walling*, 327 U.S. 186	6
See v. *City of Seattle*, 387 U.S. 541	6
United States v. *Culver*, 224 F. Supp. 419	6, 8
United States v. *Gifford-Hill-American, Inc., et al.*, No. 515, this Term	8, 9
United States v. *Invader Oil Corp.*, 5 F. 2d 715	8
United States v. *Morton Salt Company*, 216 F. Supp. 250, affirmed, 382 U.S. 44	6
Will v. *United States*, 389 U.S. 90	5, 9
Constitution and rules:	
U.S. Constitution, Fourth Amendment	6
Federal Rules of Criminal Procedure:	
Rule 17(a)	2, 6
Rule 17(c)	6

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1014

OWEN B. LAMPMAN AND THRIFTIMART, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, AND JESSE W. CURTIS, A JUDGE THEREOF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as modified following a petition for rehearing (Pet. App. E, pp. 14–17; Pet. App. F, p. 18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1969 (Pet. App. E, pp. 14–17). A petition for rehearing was denied on December 2, 1969 (Pet. App. F, p. 18). The petition for a writ of certiorari was filed on December 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

375-384—70

QUESTION PRESENTED

Whether the court of appeals properly denied a petition for a writ of mandamus directing the district court to set aside its order denying a motion to quash a subpoena duces tecum for production of corporate books and records before a grand jury.

RULE INVOLVED

Rule 17(a) of the Federal Rules of Criminal Procedure provides as follows:

> (a) *For Attendance of Witnesses; Form; Issuance.* A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

STATEMENT

On August 9, 1968, petitioner Owen B. Lampman was served with a subpoena duces tecum (R. 48) directing him to appear before a grand jury, Central District of California, on August 19, 1968, and to produce the following books and records of Thriftimart, Inc., for fiscal years ending in March, 1963 to 1967 (exclusive of books and records of Smart and Final Iris Company and other subsidiaries of Thriftimart, Inc.): (1) Minute Books; (2) General Ledgers; (3) Ac-

counts Payable Ledgers; (4) Voucher and/or Check Registers for Payments of General Operating Expenses, Excluding Payroll Payments; (5) General Journal Adjusting Entries; (6) Schedules Showing Reconciliation of Book Income and Expenses to Reported Income and Expenses Per Form 1120; (7) Charts of Accounts; (8) Vendor Code Numbers; and (9) Organization Charts.

On August 14, 1968, the district court denied petitioners' motion for a stay of time for the witness to appear before the grand jury or in the alternative to have the subpoena quashed (Pet. App. A).

Following the filing of a petition for a writ of mandamus in the court of appeals on August 16, 1968, Circuit Judges Barnes and Ely, in an order filed September 10, 1968, stayed compliance with the subpoena and, in addition, authorized the district court to conduct any further hearings which, upon motion of the petitioners, it might choose to conduct and which might afford the court of appeals a more complete record upon which to rest its disposition of the matter. (Pet. App. B, pp. 2–7; R. 9–14). Pursuant to that order, petitioners on September 16, 1968, filed in the district court a renewed motion for order or orders with respect to the subpoena duces tecum, including an order permitting them to file a motion to quash the subpoena (R. 4–5).

On November 14, 1968, pursuant to authorization by the district court, petitioners filed a motion to quash the subpoena and for other orders related thereto, including an order for implementation of the record (R. 20–23). On November 25, 1968, the government

filed its opposition to petitioners' motion, together with an affidavit of Department of Justice Attorney Donald A. Hansen and a memorandum of points and authorities (R. 26–42).

Due to the imminent expiration of the life of the grand jury before which the subpoena duces tecum was returnable, a stipulation was entered into on December 5, 1968, providing that, if acceptable to the court of appeals, the expiration of the grand jury's life would not cause the litigation to become moot and that it would not be necessary for the government to have a new subpoena issued to petitioner Lampman (R. 44–47).

On December 9, 1968, the district court issued an order granting petitioners' motion to make a more complete record on appeal (Pet. App. C, pp. 8–10). It provided for the filing of a motion to quash and supporting affidavits and for the filing thereafter of an opposition by the government. Pursuant to that order, an affidavit of Willam J. Currer, Jr., attorney for petitioners, was filed on December 23, 1968, in support of the motion to quash the subpoena. See Supplemental Record on Appeal. On December 31, 1968, the government filed a renewed opposition to the motion to quash the subpoena (R. 54–55). The renewed opposition relied upon the government's November 25, 1968, opposition to the motion to quash and the affidavit of Donald A. Hansen and the memorandum of points and authorities in support of the opposition (R. 26–42).

On February 26, 1969, the district court denied the renewed motion to quash the subpoena duces tecum

and ordered that the record of the district court proceedings be forwarded to the Clerk of the Court of Appeals (Pet. App. D, pp. 11–13).

The opinion of the court of appeals (Pet. App. E, pp. 14–17), denying the petition for a writ of mandamus, consolidated this case with the similar case of *Gershon L. Lewis* v. *United States*, which is pending before this Court on a petition for certiorari in No. 1020. The court held that the orders of the district court were interlocutory and not appealable, citing *Cobbledick* v. *United States*, 309 U.S. 323, and were not such that the court of appeals should seek to control the district court's action under the All Writs Act (28 U.S.C. 1651), citing *Will* v. *United States*, 389 U.S. 90.

ARGUMENT

Petitioners apparently are alleging, in substance (Pet. 3–4), that the subpoena duces tecum was unreasonable; that its issuance was unlawful because it was issued without the knowledge or authorization of the grand jury or the district court; that the government proposes to violate the secrecy of the grand jury by having the subpoenaed records examined for the grand jury by agents of the Internal Revenue Service; and that the government proposes to have unauthorized persons present while the grand jury is in session. There is no merit to any of these contentions.

As set forth in the affidavit of Donald A. Hansen, Special Attorney, Department of Justice (R. 27–29), the subpoena duces tecum was prepared by him and was issued in connection with a grand jury investigation, duly authorized by the Department of Justice,

concerning the making of political campaign contributions and the treatment of such contributions for federal income tax purposes. The subpoena was prepared and issued in accordance with the provisions of Rule 17(a), Federal Rules of Criminal Procedure. Contrary to petitioners' apparent contentions (Pet. 3, 7), it is not necessary that an inquiry be initiated by a grand jury before a subpoena to produce records for consideration by it may be issued. *United States* v. *Culver*, 224 F. Supp. 419, 432 (D. Md.); *United States* v. *Morton Salt Company*, 216 F. Supp. 250, 257 (D. Minn.), affirmed, 382 U.S. 44.

With respect to the production of corporate books and records in response to a subpoena, the Fourth Amendment to the Constitution requires only that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The gist of the protection is the requirement that the disclosure sought shall not be unreasonable. *See* v. *City of Seattle*, 387 U.S. 541, 544; *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208–209. This requirement is recognized in Rule 17(c), Federal Rules of Criminal Procedure (Pet. App. G, p. 20), which provides that the court on motion may quash or modify a subpoena if compliance would be unreasonable or oppressive.

The subpoenaed books and records of Thriftimart, Inc., are needed by the grand jury for the purpose of determining what political campaign contributions were made by Thriftimart and whether such contributions were expensed by the corporation in its books and deducted unlawfully on its income tax returns.

The subpoena described the books and records with specificity and particularity. That the subpoena is reasonable in scope, and that the books and records it calls for are relevant to the purpose of the investigation, is shown by the affidavit of Donald A. Hansen (R. 27–29). The affidavit refers to information submitted by the Internal Revenue Service which indicates that political contributions of various corporations and businesses have not been reflected on their books as such, but have been disguised in books and records in such forms as advertising expenses, printing costs, legal fees, trade association dues, and miscellaneous expenses.

As stated in the affidavit of Donald A. Hansen (R. 27–29), the books and records of Thriftimart called for in the subpoena duces tecum will be examined only by the grand jury, attorneys of the Department of Justice, and agents of the Internal Revenue Service sworn as agents of the grand jury and authorized by it to examine the books and records, out of the presence of the jury, for the sole purpose of reporting to the grand jury and assisting the grand jury in its investigation. The books and records will remain in the custody of the grand jury and the United States Attorney and neither the books and records nor information obtained from them will be disclosed to unauthorized persons by the Department of Justice or its attorneys or by the agents of the grand jury. Agents of the Internal Revenue Service sworn as agents of the grand jury will not be present while the grand jury is in session except to the extent that one of them may be before the grand jury as a witness.

The proposed use of agents of the Internal Revenue Service as agents of a grand jury is consistent with long established practices of the Department of Justice in the conduct of inquisitorial grand jury investigations. When voluminous books and records are subpoenaed in such investigations, as here, it is necessary that the grand jury have the assistance of accounting experts who can examine and explain the books and records for the grand jury. Such practices have been sanctioned by the courts. See *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (C.A. 7); *United States* v. *Culver, supra*, p. 432; *Application of Kelly*, 19 F.R.D. 269 (S.D. N.Y.); *United States* v. *Invader Oil Corp.*, 5 F. 2d 715 (S. D. Cal.).

Petitioners suggest (Pet. 5–6) that the Court should consider this case in connection with the case of *United States* v. *Gifford-Hill-American, Inc., et al.*, No. 515 in this Court, in which certiorari was granted on the petition of the government on December 15, 1969. In that case, involving an antitrust prosecution, the Court of Appeals for the Fifth Circuit granted petitions for writs of mandamus directing (1) that the defendants may obtain grand jury transcripts as material documents in the possession of the government under Rule 16(b), Federal Rules of Criminal Procedure, and (2) that the defendant corporations may discover the grand jury testimony of all their present and former officers and employees concerning their corporate activities on the ground such testimony is the "recorded testimony of the defendant" within the meaning of Rule 16(a)(3) of those rules.

Contrary to the allegations of petitioners (Pet. 15), *Gifford-Hill-American, Inc.*, and the instant case deal with entirely different issues, and there does not appear to be any conflict between the decision of the Court of Appeals for the Fifth Circuit and the decision of the court of appeals in this case. The government petitioned for certiorari in *United States* v. *Gifford-Hill-American, Inc.*, No. 515, this Term, because of the importance to criminal law enforcement of questions concerning the construction of the discovery provisions of the recently revised Federal Rules of Criminal Procedure. No such important questions have been raised by petitioners. Moreover, the government has suggested the mootness of the *Gifford-Hill-American, Inc.*, case in a memorandum filed with this Court.

Petitioners have not shown any extraordinary cause for issuance of a writ of mandamus. In *Will* v. *United States*, 389 U.S. 90, 95–96, this Court stated that the writ of mandamus has traditionally been used only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so; that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy; and that a party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. The Court further stated (p. 104) that the extraordinary writs do not reach to cases where the district court may have erred on matters within its jurisdiction

and that the writs may not be used to thwart the congressional policy against piecemeal appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
DONALD A. HANSEN,
Attorneys.

FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970